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NOV 2 1903
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IN THE

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.....*Plaintiff in Error.*

v. No. 68

WILL HOLLOWAY.... .....*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Defendant in Error.

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ARKANSAS DEMOCRAT CO. LITTLE ROCK.

IN THE

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.....*Plaintiff in Error.*

v. **No. 352**

WILL HOLLOWAY.... .....*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Defendant in Error.

Learned counsel for the plaintiff in error has not given a full statement of the case, nor has he abstracted all the evidence introduced to sustain the issues of the

defendant in error, hereinafter called the plaintiff, hence we make an additional statement of the case and abstract of the evidence.

While the plaintiff charged various grounds of negligence only one was finally submitted to the jury, hence only that cause will be considered here. The plaintiff charged that he had received certain injuries by reason of the negligence of the defendant, as follows:

"That on the 27th of October, 1900, he was employed by the defendant company as a fireman; that on the 29th of October, 1900, he entered upon his duties as such fireman, and began work for the defendant company as such, and that on the 31st of October, 1900, he was engaged in his duties as such fireman, and that on the night of said day, while he was so engaged, he and one W. H. Davis, who was employed by said defendant as an engineer, were at Brinkley, Monroe County, Arkansas, and while there the said W. H. Davis, and the plaintiff received orders from their superior officer, the chief night dispatcher or trainmaster of the defendant company, at Little Rock, Arkansas, who had exclusive control of the movement of all trains and engines, at about 11 o'clock at night, directing them to back up switch engine No. 3, consisting of an engine and tank or tender, from Brinkley east to Hulbert, a distance of about 60 miles, because engine No. 33 in use at the dirt pit at Hulbert, where quite a number of

men were at work repairing the road bed, was ditched and disabled; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so the headlight would be in front and the tank or tender in the rear, and they would thereby be enabled to run the same with greater safety, but this request was refused, and they were directed by said chief night dispatcher or train master, at Little Rock, to back said engine down to Hulbert, a distance of about 60 miles in the night time as aforsaid, when it was dark; that in obedience to such orders and directions, the said Davis, as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. of the night of October 31, 1900, with said switch engine No. 3, backing the same east in the direction of Hulbert; that in obedience to such directions, they continued to run said switch engine backward until they reached trestle No. 547, a distance of about 13 miles east of Brinkley, where they ran upon and collided with a horse upon said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed, and the plaintiff was caught between the the tank or tender and the engine and was thereby seriously and permanently injured, as set out in the complaint (R. 4); that the said negligence of the defendant company consists in this, to-wit:

"That the brakes of the engine were out of repair and could not be worked or used at the time of the in-

jury aforesaid, that is to say when the air was applied to the brakes, those on the tank or tender in front of the engine. that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender, while the brakes on the engine were not in a condition to work, the same being out of repair, and the shoes could not be made to clasp the wheels and thereby stop the engine. In fact there were no shoes on the brakes of the engine, and when the engineer discovered the horse on the track he immediately applied the air to the brakes so as to stop the engine and tank or tender as soon as possible. The brakes were successfully applied to the wheels of the tank or tender, but the brakes on the engine being out of repair could not be worked, and the shoes of said brakes, if any, could not be made to clasp the wheels. That the effect of applying the air to the brakes as aforesaid was to stop the tank or tender, in front or east of the engine, and it had no effect whatever on the engine. Thus the engine was forced with all its weight and momentum upon and against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the engine and tank or tender closer together, and as the plaintiff was attempting to escape by going out between the ends of the engine and tank or tender, he was caught between the same and thereby injured as

aforesaid; that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes." (R. 10, 11 and 12).

To this complaint the defendant filed an answer in which it denied negligence upon its part and charged contributory negligence upon the part of the plaintiff, and in answer to the specific charge of negligence above set forth, it said:

"Denies that the brakes of the engine were out of repair and could not be worked or used at the time of the injury aforesaid as alleged in plaintiff's complaint, and in respect to said brakes this defendant alleges that said engine had no brakes whatever on the engine," (R. 14.)

The plaintiff, Will Holloway, testified as follows:

On the 30th of October, 1900, I was locomotive fireman for the defendant. I started to work for the defendant as such fireman on the 29th of October, 1900. I left Little Rock and stopped at Brinkley, which is about sixty miles east of Little Rock. We left Little Rock at 1 o'clock on the night of the 29th; we went from Brinkley to Hulbert which is about sixty miles east of Brinkley. Hulbert is this side of Memphis about nine miles. We left Hulbert about 1 o'clock in the afternoon for Brinkley with engine W. & B. 3. We did not bring the engine back that we carried down; we came back on engine W. & B. 3. I had never seen

this engine before. We were ordered to Brinkley. There was no train attached to the engine, just the engine and tank. Davis was the engineer. When we reached Brinkley we had orders to back up from Brinkley to Hulbert. We received these orders about 10 o'clock at night. When we reached Brinkley we were told that we had to back up to Hulbert. We requested that the engine should be turned but the request was refused. The engine we were instructed to back down to Hulbert was the same upon which we came from Hulbert to Brinkley. We started to Hulbert on engine W. & B. 3. We went some twelve or fourteen miles at a speed of some seven or eight miles an hour. When we had gone this distance, I was putting coal in the fire box and the engineer, Davis, was looking out and he hollooed out to me to look out. I shut the door and started to get out. I stepped out backwards and put my foot on the step to catch myself the way the engine was going to keep from falling. As I stepped back, he applied the air, threw the air in the emergency, gave her all the power she had to stop her, and in an instant, she struck the horse. The tank and tender all bungled up together and caught me as I went to get out. I hallooed to him to release the air, that I was caught and he did so, which caused the tank to separate. I then fell on my knees and left the engine. The first knowledge I had of any obstruction was when Davis hallooed "look out, look out!" After

he said this I think the car ran some 50 or 75 feet before it struck the horse. The effect of the collission was that the chafing irons, that is, the two irons that play between the tank and engine were broken into four pieces and judging from the way the engine got back over the tank, the goose neck was bound to have bent to let it over. The end of the engine from the end of the tank is from 20 to 20½ inches. This would be the distance between the ends, they are coupled with this goose neck; this goose neck enters into what you call the brass casting. I was caught between the tank and engine while attempting to get out and was injured as described in the complaint. (Tr. 24-28).

Witness continuing said:

I did not know that the engine had no brakes when we were ordered to back it to Hulbert. When the engineer applied his air to the brakes and it did not stop, I got off and told him that none of the shoes of the engine ever clasped the wheel. I did not know that the engine had no brakes at all until I read it in the answer to my complaint. (R. 28-30).

We received this engine from the traveling engineer, the engineer in charge. He said "that the engine was coming to the shop for repairs; that she had worn out her brasses and pony trucks ahead and he used car brasses there for a make-shift". The hose on the left side from the tank to the injector was bursted

and I wrapped that with some old bagging, and her blower pipe, the valve was off that entirely and it filled the cab with steam and water. I had a plug in there and kept it wrapped with waste. That was on the tank. The defect that I spoke of in a certain wheel was the pony trucks which ran ahead of the engine. The engineer said he put some car brasses in there and she would do until we got to the shop. I objected to going back, backing the engine. I said I did not want to do it and asked the engineer to ask the train master to let us turn the engine; but he declined to do it. After taking the matter into consideration, Mr. Davis, the engineer, and I had a talk in regard to turning the engine; and it being a case of emergency, I considered that if they wanted me to back the engine up they would use every precaution, give me a clear track, and thinking too I could make the trip without any very great danger to myself, I consented to go, they being the master and I being the servant. I knew it was more dangerous to back up the engine than to go with the engine in front; but not so much so that it would be at all obvious. (R. 34-35).

Seven miles an hour is not fast. Running at this speed the engine is supposed to be under control with proper appliances. If the engine had been properly equipped with brakes it could have been stopped within two lengths of itself easily. I could not tell you how far an engine equipped like this without any brakes

would go. In returning on this engine from Hulbert to brinkley I could not tell whether she had brakes on or not. I have all I can do when I fire a locomotive to attend to my own business without looking after the engineer's business. I had to look after my coal, water and lights. My business does not require me to look after the machinery, I do not remember any grades between Hulbert and Brinkley that amounted to anything. (R. 36-37).

The engine would not run ahead of the tender where it is coupled up with safety chains and goose neck. There is not a play of fifteen to twenty inches between the engine and tank. It is only about two and one-half to three inches at the outside. There is a gangway between the two of twenty and one-half inches from the engine to the tank. The gangway is an opening. The air applied to the tank, with the coal and water on her, nothing but a light train would be sufficient to hold her perfectly level; it would not produce a jumping sensation. This was a ten wheel engine; she had three drivers on each side; the brakes are located between the two drivers on each side. If a man is on the ground he can see whether the brakes are there or not. If he is walking up to the engine to get on it and he looks, he can see the brakes. The weight of the engine is so much greater than that of the tank that the tank would drag along perfectly still

when the air is applied and it would not be abrupt. (R. 38).

The weather was not thick cloudy but there were clouds floating over; but it never got thick cloudy until four o'clock in the morning after the accident. We went back from Brinkley to Hulbert on account of engine 33 being disabled in the pit and we started back with this engine to use it in the pit. The hose of which I spoke was under the tank; it was leaking and I wrapped it with some packing. To do this I had to get under the tank, under the front trucks of the tank. When we started back to Hulbert the traveling engineer remarked to us that they had put a car box brass in the pony trucks, that was all he had to put in it; that we would have to watch it and if it ran hot we would have to stop and oil and cool it, but it did not run hot and we did not stop to cool it. When we had the collision the wheels of the tank ran off the rail something like twenty or thirty inches. It veered a little to the south as it left the track. I went out on the engineer's side; he sits on the right hand side (R. 46-47).

On the night of the injury an engineer standing on the cab where we were and where it was our duty to be, our range of vision would reach the ground in front of us from 60 to 70 feet. In other words, we could see the ground a distance of 60 feet from where we were in the

cab. If a horse was on the track we could have seen the bulk even sooner than that. In my opinion, we could have seen the horse from 60 to 75 feet ahead of us on the night of the injury. I noticed the engine that night after the injury and the shoes did not clasp the wheels. My attention was not called that night after the injury to the breaks more than just merely passing by; don't remember whether there were shoes on the brakes or not. It seems to me there were; but I may be mistakened about that. When the air was turned on the shoes did not clasp the wheels. If the engine had been properly equipped with brakes with the air turned on, the shoes would have clasped the wheels. In fixing the pipe or hose above referred to, it did not bring me in touch with the brakes under the engine. I was behind the fire box at the end of the engine, seated with my back to the engine and my face to the back of the tender working on the hose in front of me. Unless my attention had been called especially to the brakes I would not have seen them. At the time I left Brinkley I supposed the brakes were in proper working order. I never worked on an engine before that was not properly equipped with brakes. If there had been brakes on the engine, when the air was turned on, the effect would have been to hold the tank and engine the same distance apart and keep them perfectly steady. An engine and tank can be stopped a great deal quicker where the brakes are in proper order and on both the

engine and tank than it could where the brakes could only be applied to the tank. The engine is several times heavier than the tank. The effect of turning on the brakes on both the engine and tank supplied with brakes, would be to hold them the same distance apart; and they could be stopped quicker with proper appliances than they could if they had no brakes upon them. The weight of the engine along with the air applied to the wheels would stop it almost instantly. After I got onto engine No. 3 W. & B., I had no occasion to do any work where the apparatus of the brakes was constructed or made. I had nothing to do about the engine which would have called my attention to the brakes whether they were in condition or out of condition. I was only out of my engine once from Hulbert to Brinkley and that was the time I got off to wrap the hose and that was where I could not see the brakes (R. 54 55).

In running the engine without brakes and running it in front of the engine as we did in coming from Hulbert to Brinkley, there was no occasion for stopping the engine in any way for me to notice that there were no brakes on the engine or that they were out of repair. We had no occasion to use any brakes in case of emergency or anything of the kind. In coming into a station, or making a stop for a water tank, we shut off and rolled in slowly. There was no occasion for us to put on the brakes with any force at all; we had nothing

but the engine and tank. There was no occasion for us to put on the brakes so as to call our attention to the fact that the tank was dragging. The weight of the engine is so much greater than that of the tank that it would drag it along running at anything like speed (R. 61-62).

The witnesses who testified that the brakes could be seen from the position of the fireman in the cab were mistaken. Since such testimony was given yesterday I have made a personal examination and find that while standing in the cab where the fireman is required to be, I can not see the brakes. There is a window directly in front of a man standing in the cab; then there is a plank supposed to be anywhere from 28 to 30 inches wide; that comes right along by each side of the boiler and back through the cab. This plank runs to the end of the boiler and is placed over the wheels so that the brakes can not be seen from where the fireman is required to be. You cannot see the brakes at all. I have examined an engine precisely like the one on wnich the injury happened. The brakes are situated immediately under the planks so that the view from the cab is obstructed. I had a conversation with Davis, the engineer, sometime after the injury happened in the office of Mr. J. W. House. He then said that when he first noticed the object on the track at the time of the injury, it was somewhere from 40 to 60 feet ahead; that he realized it was an object

of some kind or obstruction and applied the air, and at the same time hallooed to me to give me an opportunity to get out (R. 85-86-87).

Will Barger, in behalf of plaintiff, testified as follows:

I am a fireman, and was in the employ of the defendant company about the 30th of October last. I was at Hulbert about that time. I know engine No. 3, W. & B. I worked on it as fireman. I knew this engine before the injury happened to the plaintiff. She had air on her tank, but none on her drivers. I knew it was in this condition a little while before the plaintiff was injured. I worked on that engine in the pit at Hulbert for several weeks as brakesman. As far as I can remember, I do not think there was any apparatus for the brakes, but there might have been without my seeing them; could not say positively, but I don't think there was (R. 56-57).

I have been brakesman on the railroad for about seven years. If engine and tank No. 3, W. & B., had been properly equipped with brakes it could have been stopped within about ninety feet after seeing an object before it. If there were no brakes on the engine it would go further, of course; it would go about 100 to 125 feet. If both had been supplied with brakes it ought to have been stopped within sixty to seventy-five feet (R. 82-84).

J. W. House testified:

The engineer, Davis, came to my office to advise with me about bringing suit against the company. In several conversations I had with him, in order to determine the question of the liability of the company to him, he said he saw some object; that at first he thought it was a shadow, but that he immediately saw it was some obstruction on the railway and he applied the brakes at once. My recollection is that he said it was anywhere from forty to sixty feet in front of the engine when he first observed it (R. 92).

The witness, Farrell, testified as follows:

I am a fireman for the defendant company and have been for 10 or 11 months. From my experience and observation I would say the engine upon which Holloway was injured, No. 3 W. & B., with the engine and tank properly equipped with brakes and running at a speed of 7 or 8 miles an hour could be stopped within 60 to 75 feet. If there was no brakes on the engine, it would run from 40 to 50 feet further. (R. 83-84).

The defendant introduced the following testimony, E. M. Roberts testifying as follows:

On the 30th day of October, the day of the accident, I was foreman locomotive of car department at Brinkley for the defendant company. The engineer

and the plaintiff came into Brinkley on an engine, No. 3 W. & B. I know the engine; she has only tank brakes on her, but there was no brakes at all on her drivers of any kind; never have been since I have been in charge of the engine, two years last February. There were no brakes on the engine on the date of the accident. The engine has three driving wheels on each side. If brakes had been on the engine they would have been on two of the driving wheels on each side, on the two back wheels. (R. 64-65).

If the engine was traveling six or seven miles an hour under perfect control and an animal should be discovered on the track from 50 to 75 feet in front of the engine, she could have been stopped in from 35 to 40 feet at the outside. (R. 64-65.)

They were ordered to go back to Hulbert after they arrived at Brinkley. I knew the engine was going backwards when it did go; they were instructed to run it backwards. They had orders to back up from Brinkley. I had no authority to change the order without some authority from headquarters. They had to back that engine up in order for her to be headed right to work in the pit when they reached Hulbert. The engineer wanted to work the engine in front after they reached Hulbert so the engineer could see right ahead of him when he was working loading or handling these gravel cars. That is, they wanted the engine

headed the way she then was when they reached Hulbert. (R. 68).

C. H. Welsch testified:

On the date of the accident I was master mechanic of the defendant company. I was acquainted with the engine the plaintiff was on. If he was riding on the engine and there were no brakes on the driving wheels of the engine there would be nothing about the riding of the engine which would tend to show him that part of it. If the air was applied to the tank and no brakes were on the engine there would be a little difference in the distance in which it would stop. I don't think there would be any bumping or running along in front; don't think there would be any difference about that part of it. (R. 70).

J. T. Wells testified as follows:

I was train dispatcher for the defendant Company on the night the injury is alleged to have occurred to Holloway. I remember the night the engine went off of the track with Engineer Davis and Fireman Holloway. I was the dispatcher on duty that night and had charge of the trains. The engine they were on had left Hulbert at 1:05 p. m. to go to Little Rock for repairs. While they were coming from Hulbert to Brinkley an engine broke down at Hulbert, and we stopped this engine at Brinkley and this engine was ordered back to Hulbert to take the place of the disabled one. The

telegram which I sent and under which they acted is as follows:

"No. 83 C. & E. 1st and 2nd No. 9, Edmonson; C. & E. W. & B. Eng. 3, Brinkley. W. & B. Eng. 3 will run special from Brinkley to Hulbert, and has right of track to Summit against 1st and 2nd No. 9, Engines 31 and 17, and will back up carefully."

This is the last order I gave them. (R. 71-72).

By consent of the parties the jury were permitted to view the locomotive or one exactly like the locomotive upon which the injury happened, under proper instructions from the court (Record 92-93). And photographs of the engine are made a part of the record, showing both sides of the engine. (R. 95-96).

The defendant read the deposition of W. H. Davis, the engineer, and by examination of his testimony and the correspondence had with the plaintiff's counsel it will be seen that while he was writing that his evidence would be of material advantage to the plaintiff, at the same time he was trying to get back his job with the railroad company, and sending the letters of the plaintiff's counsel to the trainmaster of the defendant company. In other words, his testimony shows that he was acting with duplicity and dishonesty. For deposition of W. H. Davis, see Record 74-79; and for Davis' letters to counsel for plaintiff, constituting Exhibits "A," "B" and "C" to above deposition, see

Record 127-128; and for copies of letters of plaintiff's counsel to Davis, see Record 89-90-91.

ARGUMENT.

We have given an abstract of the plaintiff's testimony and a partial abstract of the defendant's testimony, as far as we deem it necessary, to show that there was a conflict in every material issue except as to one, and that is, as to the defective condition of the brakes on the engine; and as to this, the defendant admits there were no brakes at all. And to show further that there is not an issue involved in this case which has not been decided so often by the courts of last resort that they have become elementary; to establish this, it is only necessary to call the attention of the court to the testimony and the law given by the court. But it is contended by learned counsel for the defendant that there is no specific charge of negligence charged in the complaint. If this be true, the English language is at fault. We are unable to see how negligence can be more specifically alleged and proven. It is alleged that the engine was a regular road engine, that is, a large engine with three driving wheels on each side. This is not denied. It is charged that the brakes on the engine were out of repair, or that there were no brakes on the engine. This is not denied; but it is admitted that the engine was not supplied with brakes at all. It is charged that the engineer

and the plaintiff, a fireman, were directed by the chief night dispatcher or trainmaster to run the engine, in the night time, backward from Brinkley to Hulbert, a distance of about sixty miles. It is admitted that they ran the engine backwards in the night time, but denies that they were so ordered. But it is proved by the trainmaster that such order was given. Here is the order:

"No. 83, C. & E. 1st and 2nd No. 9, Edmonson; C. & E. W. & B. Eng. 3, Brinkley. W. & B. Eng. 3 will run special from Brinkley to Hulbert, and has right of track to Summit against 1st and 2nd No. 9, engines 31 and 17, and will back up carefully" (R. 72).

And it is shown by defendant's witnesses that no one had a right to change this order except the train dispatcher. It is shown by defendant's evidence that it was necesssary to run the engine backwards so as to have the engine in front, that is, fronting west, when it reached the dirt pit at Hulbert as there was no turn table there to change it. It is further shown by defendant's evidence that the engine was ordered there as a matter of necessity to take the place of an engine which had been disabled.

It is further alleged by the plaintiff that by reason of the fact that the brakes were out of repair or that by reason of there being no brakes at all when the air was applied to the brakes the effect was to stop the

tank or tender in front of the engine, and that it had no effect whatever on the engine; and that when the tank in front of the engine collided with the horse, with the brakes applied, the effect was to force the engine with all its weight and momentum upon or against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank; and thereby bringing the ends of the tank and engine closer together; and as the plaintiff was attempting to escape between the engine and tank, he was caught between the same, and injured as alleged. Here is a specific act of negligence charged, and the proof fully sustains the charge. The plaintiff testified that when the engineer, Davis, discovered the horse upon the track, he hallooed "Look out; look out!" and immediately applied the air, threw the air into the emergency and gave her all the power he had to stop her, and that they ran some 50 to 75 feet after this before they struck the horse. It is true that the engineer testified that he did not see the horse; but in this it is shown by two witnesses that he had previously stated that he saw an object some 50 or 60 feet in front of the engine before he struck it; and the correspondence between Davis and the attorney for the plaintiff shows that while he was pretending that he was friendly to the plaintiff and that his testimony would be important to him, at the same time he was sending the letters of the said attorney to the superintendent of the railroad

with the view of trying to be reinstated. In other words, his conduct shows him to be unworthy of belief. The testimony further shows that if the engine had been properly equipped with brakes that it could have been stopped within from 40 to 75 feet. Barger testified that with proper brakes, with the engine running seven or eight miles an hour, it could be stopped at about 75 feet; but that without brakes on the engine it would go 125 feet before it could be stopped. Farrell testified that running seven or eight miles an hour with the engine properly equipped with brakes it could be stopped at from 60 to 75 feet; but if there were no brakes on the engine it would run 40 or 50 feet further before it could be stopped. In other words, the proof shows that if the engine had been properly equipped with brakes, that the engineer, after seeing the horse on the track, could have stopped the engine before there was a collision and thereby prevented the injury; and the instructions of the court specifically directed the attention of the jury to this issue (R. 18).

In other words the jury was told by the court, "that if the accident would not have been prevented, even if there had been suitable brakes on the engine, then the plaintiff cannot recover" (R. 102).

Holloway testified that although he had been brakeing on railroads for several years this was the first

engine that he had ever been on which did not have brakes. But this was unnecessary, to run a heavy engine as this was shown to have been, without brakes is negligence *per se*. The courts take knowledge of any fact which is known to everyone.

Brown vs. Piper, 91 U. S., 37.
12 Am. & Eng. Ency. of Law, 197.
Ry. vs. Warner, 108 Ill., 538.
Smith vs. Potter, 46 Mich. 258.
89 Am. Decisions, 663.
49 Am. R., 201.

Even if negligence was not specifically alleged and the defendant goes to trial and evidence is introduced without objection showing negligence, the complaint will be considered amended so as to conform to the testimony.

Gainus vs. Cannon, 42 Ark., 503,
Ry. vs. Triplett, 54 Ark., 289.
Texarkana Gas Co vs. Orr, 59 Ark., 215
Dorris vs. Grace, 24 Ark., 326.
Healey vs. Conner, 40 Ark., 352.
Ry. vs. Harper, 44 Ark., 524.
Davis vs. Goodman, 62 Ark., 262.
Hanks vs. Harris, 29 Ark., 323.

When a given state of facts are proven from which negligence may be inferred, it makes a *prima facia* case of negligence; and it was then incumbent on the defendant to show that operating the engine without brakes was not negligence. The testimony shows that had the engine been properly supplied with brakes and applied as the proof shows, it could have been stopped before it collided with the horse, and the injury thereby avoided.

Peirce vs. Kile, 80 F. R., 867.

And besides it is specifically charged in the complaint that it was negligence to operate an engine with defective brakes or without brakes at all and this is not denied, hence so far as this is concerned it stands confessed that to operate an engine without brakes is negligence, and no proof as to that was necessary.

II.

Learned counsel also contend that the plaintiff was chargeable with knowledge that there were no brakes on the engine. The evidence on this point was conflicting, and it was for the jury to determine this issue. They did determine it in favor of the plaintiff and their finding is conclusive. Holloway says that he did not know there were no brakes on the engine. As an evidence that he did not know of this it is shown in his original complaint that he only charged

that the brakes on the engine were defective, and when air was applied, that the brake shoes would not clasp the wheels, and it was not charged that there were no brakes until the defendant filed its answer in which it denied that the brakes were defective; but stated that the engine was not supplied with brakes at all. This was the first that he knew of their being no brakes on the engine. He testified he had neven seen the engine until about 1 o'clock of the day before the injury occured at night; that the engine was turned over to him and the engineer at Hulbert by the traveling engineer to be carried to Little Rock for repairs; and that the traveling engineer said that some of the brasses were out of the pony trucks or small wheels in front of the engine; that he boarded the engine at Hulbert and had no occasion to get off of it but once between there and Brinkley, a distance of about 60 miles, and then he got out to bind a hose under the tank and in doing that his back was toward the engine; and besides, his view of the engine was obstructed by the fire box. Hence at no time was he in a position to have seen whether the engine was supplied with brakes or not. He testifies that the road from Hulbert to Brinkley was practically level and, as they were running light, it was not necessary to apply the brakes; and that from his position as fireman in the cab he could not see whether there were brakes on the engine or not from the fact that there was a wide foot board extending from under

the cab to the front end of the engine on each side which so obstructs the view that the brakes could not be seen. This was contradicted by the defendant's witnesses who testified that the brakes could be easily seen from his position as fireman. Holloway testified after defendant's witnesses had closed that the brakes could not be seen from the cab; that he had made a personal investigation and that the brakes or their absence could not be seen, thereupon, by consent the jury were permitted, under proper instructions to go and view an engine which was admitted to be of the same make and build as the one upon which the injury occured; and the jury found from the evidence under the instructions of the court that the plaintiff did not know and that in the exercise of ordinary care he ought not to have known that there were no brakes on the engine; and the court's charge upon this subject was more favorable to the defendant than it was entitled to (R. 17-18).

Swift vs. Ry., 45 Am. & Eng. Ry. Cases, 180.
Ry. vs. Fox, 39 Am. & Eng. Ry. Cases, 318.
Houston Ry. vs. O'Hare, 64 Tex., 600.
Ry. vs. McDade, 135 U. S., 554.

The burden of proof is on the master to show that the servant knew of the defects or want of brakes, *11 Am. & Eng. Ry. Cases, (N. S.), Note 489.*

Furthermore, it would be remarkable indeed to set aside the finding of the jury on this point, when the

jury by the consent of the parties was permitted to go and view an engine which was admitted to be precisely like the one upon which the injury occured and thereby determine whether plaintiff's or defendant's witnesses were mistaken as to whether the absence of the brakes was obvious to a fireman when in the exercise of ordinary care. When the jury is permitted to view the subject-matter in controversy, their finding must be conclusive.

McReynolds vs. Ry., 14 Am. & En. Ry. Cases, 174.

Ry. vs. Walker, 20 Am. & Eng. Ry. Cases, 398.

Chicago Ry. Co. vs. Hopkins, 90 Ill., 323.

The court's attention has been called to *Fordyce vs. Edwards, 60 Ark., 441.* By reference to the court's charge, it will be seen that the criticism made in that case is fully covered by the court's charge (R. 17-18).

Indeed, the instructions of the court on this issue were much more favorable to the defendant than they should have been. The testimony both for the plaintiff and the defendant shows that the plaintiff in going upon the engine from Brinkley to Hulbert was acting under the direct command of the superintendent of the defendant company in a case of emergency. It is

shown that although the engine had been ordered to Little Rock for repairs, yet it was ordered back from Brinkley to take the place of an engine that had been disabled at the dirt pit at Hulbert. In such cases, it is held by the Supreme Court of the United States, by this court and the text writers, that although the servant may know of the defects, yet if the danger was not so obviously hazardous that a reasonably prudent man would not have taken the risk, the master is liable if injury occurs by reason of such defects.

Miller vs. Union Pac. Ry., 12 F. R., 600.
McDermott vs. Ry., 87 Mo., 285.
S. C. 28 Am. & Eng. Ry. Cases, 528.
12 Am. & Eng. Ry. Cases (N. S.), 672.
20 Am. & Eng. Ry. Cases, (N. S.), 278.
Ry. vs. Egeland, 56 F. R., 200.
Ry. vs. Egeland, 163 U. S., 93.
Ry. vs. Rickman, 65 Ark , 138.
Ry. vs. Barry, 58 Ark., 198.
Felton vs. Harbinson, 104 F. R., 737.

If the master knowingly furnished the servant with defective machinery and the servant uses such machinery under the orders of the master and is injured, the master is liable unless the machinery is so obviously dangerous that a reasonably careful man would not undertake the work.

Ry. vs. Finlayson, 18 Am. & Eng. Ry. Cases, 68.

Stephens vs. Ry., 38 Am. & Eng. Ry. Cases, 110.

Ry. vs. Everett, 152, U. S. 107.

Under the circumstances of this case, even if the plaintiff had known of the defective condition of the brakes or that there were no brakes at all, he was not guilty of contributory negligence. He and the engineer were ordered to back the engine to Hulbert. It was a case of emergency. The engine at Hulbert, where the railway company was removing gravel to repair the road, had become disabled. It was necessary to back this engine to take the place of the disabled engine. For the plaintiff to have disobeyed this order would have put the defendant at great inconvenience and expense.

Ry. vs. Young, 49 F. R., 724.

Ry. vs. Yeargin, 109 F. R., 442.

Ry. vs. Moses, 123, U. S., 710.

Kane vs. Ry., 128 U. S., 91.

Patterson vs. Ry., 18 Am. R., 412.

Ford vs. Ry., 14 Am. R., 598.

Francis vs. Ry., 127 Mo., 658.

S. C. 28, S. W. 842.

Sherman & Redfield on Neg. (5th Ed.) Sec. 211.

But we did not care to invoke this doctrine, and hence we did not ask it, although under the proof we might have done so.

III.

It is also argued by learned counsel that the defects as to the brakes or the absence of the brakes was not the proximate cause of the injury. They say, "undoubtedly the proximate cause of this injury was the presence of the horse upon the track, without which the collision and accident could never have happened." It may be true that the injury would not have happened if the collision had not occurred. But it is likewise true that the injury would not have happened, although there was a collision with the horse, if the engine had been properly equipped with brakes.

Therefore, the absence of the brakes from the engine was the proximate cause of the injury, and the jury so found. The testimony of both the plaintiff and defendant shows that if the engine had been properly equipped with brakes, it could and would have been stopped before it collided with the horse and thereby the injury would have been prevented; and the instruction of the court, as we have before shown, was specific and certain on this point (R. 18). This is a novel proposition, indeed. With the same propriety it might be said that if the conductor and crew of a freight train were directed to take such train from the

union depot in the city of St. Louis to some distant point in the night time and, just before its departure, the master intentionally causes all the brakeing apparatus to be removed, without the knowledge of anyone connected with the train, the conductor and crew start out in obedience to orders; after running a short distance the engineer sees a horse on the track in ample time to stop the train; he blows the whistle, the animal still remains on the track, he still has time to stop the train, he attempts to turn on the brakes but finds none there. The train moves on, strikes the horse, the train is derailed and the engineer and entire crew are killed or more or less injured; still the master would not be liable, because, forsooth, the collision with the horse was the proximate cause. It is only necessary to state the proposition to show its absurdity.

The fact that some other cause operates with the negligence of the defendant in producing the injury does not relieve the defendant from liability. The master's wrong combinding with some other cause and both operating proximately at the same time in causing an injury, the master is liable.

16 Am. & Eng. Enc. of Law (O. S.), 440.
2 Thompson on Neg., 1085, Sec. 3.
Bishop on Non-Contract Law, 39-450-452.
Sherman & Redfield on Neg., 31.
Eaton vs. Railway, 11 Allen (Mass.), 500.

S. C. 87, Am. Dec., 730.
Aetna Ins. Co. vs. Boon, 95 U. S., 117.
Cartersville vs. Cook, 129 Ill., 152.
S. C. 50 Am. R., 352.
Lake vs. Millison, 62 Me., 240.
S. C. 16 Am. R., 456.
Johnson vs. Ry., 13 Am. & Eng. Ry. Cases, 460.
Hay vs. Philadelphia, 22 Am. R., 733.

1 Thompson on Negligence, last edition, section 56, says: "When several proximate causes contribute to an accident and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless, without its operation, the accident would not have happened. If one of such efficient causes is due to the negligence of the defendant and the other to an occurence happening without the plaintiff's fault, the defendant is liable for damages. * * * The true course of reasoning is to consider whether the negligence of the defendant was the efficient cause of the injury; if so, the court will not speculate as to whether or not some other cause might also have produced it."

The case of *Mages vs. Ry., 21 Pac., 114,* was where a brakeman in the discharge of his duties was injured by reason of the engine being thrown from the

track by a cow. The engine was without a cow-catcher, and the brakeman knew of this. It was held that the question of his right to recover should be left to the jury.

IV.

Learned counsel also say this was a case of assumed risk, because they say that the plaintiff had no right to rely upon the presumption as to the safety of the engine, because they say it was delivered to him with the distinct understanding that it was going to the shops for a general overhauling. The traveling engineer did not tell the plaintiff that the brakes were defective or that there was no brakes, his attention was never called to this; nor is it contended that the engine was being sent to Little Rock to place any brakes upon it. The only defect mentioned was that brasses had been used in the wheels of the pony trucks and they might become hot. He certainly had the right to presume that the engine was reasonably safe as his attention was not called to any defect which rendered it unfit or dangerous for use. This was not done and, besides, the engine was not on its way to the shops for repairs when the injury happened. They had reached Brinkley with it and there they were ordered to back the engine to Hulbert to take the place of a disabled engine; and as he knew nothing of the fact that there were no brakes on the engine, he certainly had a right to presume that the brakes were in reasonably safe condi-

tion. The jury were properly instructed as to this question (R. 17-18).

Before the court can presume as a matter of law that the servant assumes the risk incident to defective machinery, it must appear that he accepted employment with actual knowledge of such defects or continued in the service after he knew, or in the exercise of reasonable care should have known of the same.

Ry. vs. Keegan, 87 F. R., 849.
Ry. vs. Miller, 24 So., 955.
O'Neil vs. Ry., 86 N. W., 1098.

The doctrine of assumed risk has no application when the servant first discovers the defect at the time of the injury.

Ry. vs. Milam, 50 S. W., 417.
Sackewitz vs. M'f'g. Co., 78 Mo. App., 114.

The servant's implied assumption of risk is confined to the class of work for which he is employed.

Ry. vs. Adams, 23 Am. & Eng. Ry. Cases, 408.

The mere fact that it was stated by the engineer in charge who turned the engine over to Davis that the

engine was to be sent to Little Rock for repairs did not require the plaintiff, a fireman, to inspect it.

Waldheir vs. Hannibal Ry. Co., 87 Mo., 37.

In *Nofsinger vs. Goldman, 122 Cal., 609, (S. C., 55 Pac., 425)*, it was held that a person not an engineer employed about an engine which is inadequate for the work being done with it and which makes steam badly is not chargeable with knowledge of the specific danger to which his employment subjects him. The mere fact that the engine was used under protest would not imply that the plaintiff, a fireman, assumed the risk.

11 Am. & Eng. Ry. Cases, (N. S.), 487 Note.

V.

The doctrine of contributory negligence so far as it has any application in this case was fully covered by the court's charge (R. 16) and need not be discussed further here. When the defendant is charged with negligence, the doctrine of assumed risk and contributory negligence are practically the same.

Ry. vs. Milam, 50 S. W., 417.

VI.

Counsel object to the instruction of the court in which the court instructed the jury as follows, to-wit:

"The railroad company is not an insurer of its employees; all that is required of it by the laws of the country is to furnish its employees working tools which are reasonably safe and a place to work in which is reasonably safe" (R. 16). It is true that this form of instruction has been the subject of some judicial criticism. But even when it has been criticised the language used here will relieve it of such criticism, and when the admitted facts in this case are considered it will be seen that such criticism has no application whatever in this case. In the first place the particular language which counsel object to is modified by that which precedes it wherein the court says, "The railroad company is not an insurer of its employees" (R. 17). And it is likewise qualified by that part which follows after the language objected to, wherein the court said, "But if that is shown" (that is, that the machinery or place is not reasonably safe), "if the evidence shows that the employee knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery without giving notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably apprehended from such use and he cannot recover." With these modifications it has been uniformly held that the instruction is not objectionable. The case of *Ry. vs. Johnson, 81 F. R., 680*, to which counsel refer, recognizes this rule.

But when it is admitted, as in this case, that the engine was not supplied with brakes at all, and had been without them for several months or even years, then the question as to this part of the court's charge does not arise.

Pierce vs. Clavin, 82 F. R., 552.

When it is shown that the master has knowledge of the defect of the machinery in use by the servant, then he is negligent and the question of the use of ordinary care in furnishing reasonably safe machinery is no longer one to be considered.

Ry. vs. Gaines, 46 Ark., 570.
Savannah Ry. vs. Pughsly, 39 S. E., 473.

This precise question was before the Supreme Court of South Carolina in a recent case (*Bussey vs. Ry.*) which is reported in *11 Am. & Eng. Ry. Cases (N. S.) at p. 474.* In that case the court instructed the jury, "that the master is bound to supply his servants with sound and safe appliances, and to keep the same in sound and safe condition," and it was there claimed by defendant that this was in effect instructing the jury that the master was bound in law to guarantee the soundness and safety of all machinery he furnishes his employees. But the court at page 482, said:

The sixth exception alleges error as follows: (6th) In charging the jury as follows: "While it is true that a servant who enters the employment of another assumes the ordinary risks of business, this would not include the risks of working with unsafe appliances; for the master is bound to supply his servants with sound and safe appliances, and to keep the same

in sound and safe condition; thus instructing the jury in effect, that the master was bound in law to guaranty the soundness and safety of all machinery he furnishes his employees. And this instruction to the jury, defendant submits, is further erroneous in that it did not take into consideration latent defects in machinery, but was calculated to lead the jury to believe that so far as any defects in machinery are con cerned, whether patent or latent an employee takes no risk with reference thereto. The charge stated in general terms a correct proposition of law, and if the defendant desired that the presiding judge should have charged more specifically, it had the right to present requests to that effect. Furthermore, when this part of the charge is considered in connection with the other parts of the charge it will be seen that the presiding judge did not, in effect, instruct the jury that the master was bound in law to guaranty the soundness and safety of the machinery furnished an employee."

And the last utterance of this court upon this question is conclusive,

In *Portland Gold Min. Co. vs. Flaherty, 111 F. R. Pamphlet, December 3, 1901*, at page 317, the court said:

"Defendant next complains of the following portion of the court's charge to the jury, namely: 'It was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work, so as not unreasonably to expose him to unnecessary danger in the doing of his work.' Counsel contend that the court should have qualified the word 'safe,' as here employed, by the adverb 'reasonably,' and not having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of this case?

"The court told the jury that the obligation resting on defendant was to use 'ordinary care' to furnish a safe place so as not 'unreasonably' to expose him to unnecessary danger. The liability of the defendant is here so carefully qualified by expressions denoting the requisite care that it is hardly conceivable that the jury could have been misled by the verbal omission. Moreover, the vice, if it be one, was cured by the immediate following context, namely: 'This duty to use ordinary care, generally, is not equivalent to insurance. The defendant was in no sense an insurer of plaintiff's safety. Defendant had to use that care that a reasonably prudent man would use under similar circumstances.' The charge, as a whole, on this point was, in our opinion, substantially correct.

"Not only so, but the error, if any, was immaterial and unprejudicial. It already appears that defendant practically admitted at the trial that it did not furnish plaintiff a reasonably safe place to work in. As already observed, defendant made no issue of that kind, but contended that it never ordered plaintiff to work in the upraise, for the very reason that it was so filled with bad air as to be dangerous."

Ry. vs. Needham, 69 F. R., 825.

Baltimore & P. Ry. vs. Mackey, 157 U. S., 84.

Rogers vs. The Marshal, 1 Wall., 644-654.

Evanston vs. Gunn, 99 U. S., 660-668.

Tweed's Case, 16 Wall., 504-516.

In *Hemingway vs. Ry.*, 7 *Am. St. R.*, at pages 829 and 830, the court said:

"That part of the charge which made it incumbent upon the employees of the company 'to exercise the utmost care, diligence, and foresight for the safety' of the plaintiff while under their charge, is excepted to upon the ground that such a degree of care was not the rule in such a case. Abstractly considered, it may be that this part of the charge was not strictly correct. The court, however, had just instructed the jury that the negligence of the company must be shown by a

preponderance of the evidence, and accompanied the objectionable language with the explanation that the care of an infant passenger, so unattended, should be greater than that required to be used towards an adult passenger."

In *Ry. vs. Miller, 25 Mich.*, at page 293, the court said:

"But whatever difficulties there may be in some cases, courts are, at least, bound judicially to know, that *no care* is *not due,* or *reasonable care;* that when no care whatever has been used in approaching a known or threatened danger, and no effort whatever to ascertain or avoid it, reasonable care has not been exercised, and the party has been guilty of negligence. There was no difficulty, and the court found none, in correctly determining that certain given statements of facts or courses of conduct would constitute negligence or want of ordinary care."

In *Ry. vs. Miller, 25 Mich.*, at page 291, the court said:

"The laws of nature and of the human mind, at least such of them as are obvious to the common apprehension of mankind, as well as the more obvious dictates of common sense and principles of human action—which are assumed as truths in any process of reasoning by the mass of sane minds—constitute a part of the law of the land, and may, and must, be assumed by the court, without being found by a jury; indeed, the finding of a jury, which should clearly disregard them, should itself be disregarded by the court. In other words, courts are bound judicially to know and apply such laws and principles as part of the law of the land. They are bound to know that there is a difference between *reasonable care* and *no care at all,* or utter negligence, and that a prudent man, in the presence of danger, naturally and ordinarily makes some use of his faculties to ascertain and avoid it; and if, upon any occasion, he does not, when he has good reason to apprehend danger, he does not exercise the ordinary

or reasonable care demanded by the circumstances. They are, therefore, bound to know, and judicially recognize, the essential differences in the nature and modes of travel and transportation upon railroads and ordinary highways, both of which are authorized by the law; and, being bound to notice the statutes of the State they must take notice that greater speed in travel and transportation upon railroads is one of the objects of the law authorizing this mode of conveyance; and that locomotives and heavy trains of cars (which are authorized by the legislature) cannot, owing to their momentum when in motion, be suddenly stopped in their course, or turn to the right or left, like a foot passenger, or a team and wagon upon an ordinary highway. * * * "

VII.

Learned counsel for the plaintiff in error in the ninth subdivision of his argument seems to put some stress upon the fourth, fifth, seventh and eighth assignments of error (R., pp. 106, 107). These assignments are in relation to the charge of the court to the jury in reference to their testimony in viewing the engine which is admitted to be like the one on which the injury occurred. But upon examining all that the court said to the jury upon this subject it will be seen that its charge to the jury is proper. The charge of the court to the jury upon this subject must all be considered together in order to determine its full import and meaning. To select a few phrases or paragraphs of the court's charge to the exclusion of all other parts is hardly fair to the trial court and certainly should not receive the sanction of this court. If such a rule is to prevail but few charges of the trial court or even the

opinions of the courts of last resort would stand the test of absolute accuracy in the use of every word or phrase or sentence. It is not that kind of accuracy the law requires. Substantial justice is what the law demands and no more. The following language is used by the court in connection with the parts objected to, to-wit:

"But, on the other hand, I also want to call your attention, and that is the reason you are taken there now, to another matter. *A man cannot shut his eyes, and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open.*

"Now, if for that reason, that is, if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours (without hunting for it), then the court will tell you that he had knowledge of and ought to have known of it, and he is chargeable with it, as if he had known it" (R., p. 93).

This part of the charge was not objected to except the phrase "without hunting for it," and when considered with the part objected to it is perfectly obvious that there was no error in the charge of the court as to the inspection of the engine. In this part of the instruction the court announces the doctrine contended for by counsel in the most emphatic terms. The jury was told that *"a man cannot shut his eyes and say that he does not want to see anything which a reasonable man could not help but see if he kept his eyes open."* The language used was more favorable to the defendant

than it was entitled to under the law. Learned counsel argues the question as though it was held that the absence of the brakes were a patent defect, if a defect at all. When the words patent or obvious defect is used it must be considered in reference to the position of the party to be affected by such defects. If Holloway's duties had required him to be on the ground at the side of the engine, there might be some reason for such a contention; but Holloway was a fireman and had nothing to do with the care of the engine. The proof shows that he had never seen the engine until the day the injury occurred. On that day he boarded the engine at Hulbert, about sixty miles east of Brinkley, in this State. The grade was almost perfectly level. They ran to Brinkley, and only stopped one time, and Holloway was out of the engine but one time; and then he wrapped some wadding around the hose under the tank in the rear of the engine, and in doing this his back was towards the engine, where he could not see the wheels of the engine nor could he see the brakes nor the absence of them. He says he could not see the brakes or the absence thereof when in the engine from the fact he says the foot boards were twenty-eight or thirty inches wide and extended from the cab to the front end of the engine. That these foot boards were placed directly over the wheels where the brakes would have been (R., p. 85). That these foot boards obstructed the view. Hence the brakes were neither obvious nor patent to him. Barger, who was a brakeman and had worked with this engine for some time, was not sure

whether there were brakes on the engine or not (R., pp. 56, 57). So when the jury went to inspect the engine they had Holloway's statement to the effect that the boards or the absence thereof were not patent or obvious to him because when he was at his place of duty, where he was required to be, he could not see them. Witnesses for the defendant had testified to the contrary. It was the province of the jury under proper instructions to make such investigations as would enable them to determine whether the plaintiff or the other witnesses were wrong. It is immaterial whether this is called mute evidence or not. The jury were permitted to view the engine by agreement, and from their observation it was their duty to determine whether the wheel was in plain view or hidden from one in the engine.

Counsel says that the jury should have been sent to the engine without any instruction. This is indeed a novel proposition. To have sent the jury to the engine without any instruction as to what they were being sent for would have permitted them to have gone into any kind of wild speculation upon questions that were really not before the court. We submit that the circuit court of appeals did not hold "this part of the charges objected to erroneous." The court simply said if this excerpt from the instructions of the court had been all that was said to the jury upon this subject it might have been erroneous—not that it was erroneous, but in fact holding that when considered with the other part of the charge that it was correct.

Learned counsel has committed the same error in criticising the opinion of the circuit court of appeals that he has in the criticism of the charge of the trial court. He selects a few expressions in the opinion and proceeds to criticise them; but the whole opinion should be considered together in order to understand what the court really means.

Ry. vs. Whitten, 13 Wall., 290.
B. & P. Ry. vs. Mackey, 157 U. S., 84.
Davis vs. Ry., 26 Am. & Eng. Ry. Cas. (N. S.), 323.

Tagg vs. McGeorge, 35 Am. St. R., 29.
Shively vs. Ry., 7 Am. St. R., 472.
Hemingway vs. Ry., 7 Am. St. R., 829, 830.
Ry. vs. Watson, 5 Am. St. R., 579, 580.
State vs. Levelle, 27 Am. St. R., 809.

We submit that counsel has committed the error of stating what his conclusion is as to what the testimony shows instead of stating what the witnesses said. We do not think it is true that Holloway stated that the "brakes upon an engine occupy a most conspicuous place." Here is what he stated in reference to the matter:

"They can be seen if a man is on the ground. He can see whether they are there or not. If he is walking up to the engine to get on he can see them" (R., p. 38). Of course, if one was standing by the side of the engine and looked for the brakes he could see them. But it must very often happen that one standing by the

side of the engine does not notice whether it has brakes or not; but this does not apply to Holloway. His duties did not require him to be at a place anywhere while he was on the engine where he could see the brakes. This was a question for the jury. The jury were permitted to view an engine precisely like the one upon which the injury happened by consent of the parties, except that the engine viewed had the brakes. But counsel say that if it was competent for the jury to view the engine at all, that they should have viewed the premises, that is, the place where the injury happened. As the jury were permitted to view this engine by consent, certainly no objections can be interposed now; but this contention cannot be maintained anyhow. There was no dispute as to the collision with the horse. There was no dispute as to the condition and situation of the cars after the accident happened. There was no dispute as to the fact that there were no brakes upon the engine. And a view of the premises would have been impossible, as the wreck had happened a number of miles away and a number of months before the trial of this case. We are unable to see how a view of the premises would have aided the jury. The question in dispute was whether Holloway saw, or, in the exercise of ordinary care, ought to have seen the absence of the brakes. As to this there was a conflict in the evidence, Holloway testifying that they were not in view of him when he was

at his post of duty, the witnesses of the defendant testifying that they were in plain view from the cab. Holloway says that after the defendant's witnesses had testified, or after they had concluded their testimony, he went with his counsel and made an examination of an engine like the one he was on, and verified his statement that he was correct and that the witnesses for the other side were mistaken. Of course, when the jury examined the engine they found that Holloway was correct. Now, if the jury could not use this information thus obtained to determine whether Holloway's or defendant's witnesses were correct, then, of course, the view of the engine was absolutely futile. But counsel say that not only the premises must have been viewed, but that each individual juror should have had the same experience as Holloway. He might have argued with the same reason and force that each juror should have been of the same height and weight. The jury in viewing the engine had to exercise only one of their senses, that is, the sense of sight. The presumption, we take it, would be that the sight or vision of each juror was as good as that of Holloway.

It is argued that the effect of the court's charge was to authorize the jury to base their conclusion entirely upon what they saw without regard to the testimony. Counsel is mistaken in this. Certainly, no suggestion or statement of this nature can be found in the court's charge to the jury to which the defendant has objected and assigned as error. All the court said upon this question is the following:

"Of course, you need not report to the court what you saw, or what conclusions you reach. That will be for you to determine when you retire to the jury room for the purpose of making up your verdict, and you are only taken down there for the purpose of looking at the locomotive as part of the evidence in this case, as there seems to be a conflict, some of the witnesses testifying that they cannot help but see it, and the plaintiff himself says that he did not see it, although he acted as a reasonable prudent man, and that his attention was not called to it.

"If a reasonably prudent person, employed as a fireman, having taken a trip of six hours' duration on it, getting on and getting off for the purpose of making the trip, if a reasonably prudent person who is exercising ordinary diligence could have seen it, then he will be chargeable with it, but he need not hunt for it and need not look for it; he has a right to presume that it was a reasonably safe machine, or if it was not, that his attention would be called to it" (R., p. 94).

This part of the court's charge was not objected to. It is too late now to object to it.

But there is still another reason why the contention of learned counsel cannot be sustained. The exceptions to the several excerpts of the court's charge are general. They point out no particular exceptions, assign no reason for its exception, make no suggestion, offer no subsitutes therefor. In such cases it has been uniformly held that such exceptions would not be upheld or considered.

Bussey vs. Ry., 11 Am. & Eng. Ry. Cas. (N. S.), 474.

S. & P. Ry. vs. McKay, 157 U. S., 86, 87.

Tweed's Case, 16 Wall., 516.

East Oregon L. Co. vs. Cole, 92 F. R., 953.

Allis vs. U. S., 155 U. S., 117.

Tucker vs. U. S., 151 U. S., 164.
St. Clair vs. U. S., 154 U. S., 153.
Humes vs. U. S., 170 U. S., 210
Lindsay vs. Turner, 156 U. S., 208.
Newport News & M. C. V. Ry. vs. Pace, 158 U. S., 36.

The same rule might be applied to the final charge of the court to the jury. The exceptions are general, no reasons are given, no suggestions are offered or other instructions or qualifying instructions. The defendant should have given its reason for objecting to the instructions or should have asked other instructions where it thought necessary and should have asked that the charge be qualified where it thought such charge was objectionable. Counsel cannot sit by and not call the attention of the court or opposing counsel to the reasons of such objections and thereby lead the court into the belief that there is no serious cause of objection, and then, after the case has been tried for the first time on appeal, make his objections specific. This should have been done in the trial court. Learned counsel in this case did not offer an instruction or suggestion defining the duties of the master to the servant. Doubtless, if the suggestions had been made to the court that defendant desired it given in the way now suggested by it, the court would have readily made the qualification, and, doubtless, counsel for plaintiff would have insisted that it should be made. Learned counsel is as unfortunate in his criticism of the opinion rendered by the circuit court of appeals in this case as

he is in his criticism of the charge of the trial court. He says that after the court had held that the company was negligent as a matter of law because the engine was not provided with brakes, he then says the court proceeded to state some exceptions to this rule. We think counsel is mistaken in this. The court in enunciating the doctrine referred to some instances in which the mere failure to supply an engine with brakes might not be negligence *per se*, that is all.

Counsel then says that the court in deciding this case overlooked important facts and bases its decision upon some facts not to be found in the record. This is a very broad statement and is in direct conflict with the language used by Judge Sanborn, who wrote the opinion. He says in substance that " the court made a careful and painstaking examination of the testimony."

Then the counsel ask where is the evidence to sustain the statement that "the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad." In the first place it was not necessary to introduce any proof upon this question. The plaintiff, among other things, alleged "that the engine was a regular road engine" (R., p. 11). The defendant does not deny this, but practically admits it. It says in its answer: " It denies that it was negligent because the said engine was a regular road engine" (R., p. 14). Here is a charge that it was a regular road engine, and an admission that it was a road engine. The plaintiff only denies that it was negligent because of the fact that it was a regular road engine.

If it was a regular road engine as charged by the plaintiff and admitted by the defendant, we are at a loss to know to what use it could be put if not to haul loaded trains or cars; but this is shown by the record. Barger says he worked on this engine at Hulbert for several months in the pit" (R., p. 57). The proof shows that this was a place where there could be no switching, and the engine was used by him in hauling cars loaded with gravel to different parts of the road. Roberts, the expert witness of the defendant, testifies as follows: "There was a necessity for the engine going to Hulbert as soon as it could get there. At Hulbert they had a dirt pit from which they were taking out dirt and putting it on the road. This was the reason for sending this engine back" (R., p. 67).

Witness also testifies: "The engine was ordered to back up to Hulbert in order that it might be turned right to work in the pit." The engine had to be worked ahead of the cars so that the engineer could see right ahead of him when he was loading or unloading the gravel cars. They had no means of turning the cars when they got to Hulbert, and in order to do so they would have to carry it to Hopefield, some little distance (R., p. 68). This shows that the engine had been at Hulbert for several months to haul loaded cars, and was returning for that purpose. But it is absolutely immaterial whether it was a road engine or a switch engine. It was then being used and had been used as a road engine and when used as a road engine it should have been supplied with brakes as a road engine. But we say

whether it is a road engine or not it should have been supplied with brakes. Holloway testifies that in his long years of experience as a brakeman and as a fireman that he had never seen an engine operated without having brakes before.

Again learned counsel ask where the evidence can be found in this record to support "the assumption of the court of appeals of the absence of brakes on this engine." He is as unfortunate in this inquiry as in the other one. The plaintiff, among other things, alleged that "the brakes on the engine were out of repair; that when the air was applied the brakes would not clasp the wheels; that there were no shoes or clasps on the brakes" (R., p. 11). The defendant in its answer denies "that the brakes were out of repair and could not be worked at the time of the injury, but alleges that said engine had no brakes whatever upon the engine" (R., p. 14). Is this positive allegation in the answer that the engine had no brakes not sufficient to justify the court in assuming that it had none. But this fact also appears from the testimony of the defendant's own witnesses. Wells testified that there were no brakes upon the engine (R., p. 70). Section 5722, Sandels & Hill's Digest of the Statutes of Arkansas, provides that the "answer shall contain a denial of each allegation of the complaint controverted by the defendant." In other words, that which is not denied in the answer is admitted to be true and no proof is necessary to be taken. We think this is the universal rule where the States have adopted the code practice.

Learned counsel contend that the use of such an engine without brakes is not negligence as a matter of law, and then he says it is shown by the testimony of Roberts that "this engine had been operated without any brakes by the White & Black River Railroad, of which he had been master mechanic," etc. We submit that counsel is mistaken as to this. Roberts' testimony shows that the engine had been owned by the White & Black River Railroad for perhaps two or three years; but there is not a word in his testimony to show the manner of its use. The proof in this case shows conclusively that it is more dangerous to operate an engine without brakes than one with them. Holloway testified that at the time the engine collided with the horse he could have seen the horse about sixty to seventy-five feet in front of them. He also testifies that if there had been brakes on the engine when the air was turned on it could have been stopped a great deal quicker. Barger, a witness for plaintiff, says: "If there were no brakes upon the engine it would have to go from 100 to 125 feet further. If both the engine and the tank had been supplied with brakes it ought to have been stopped within sixty to seventy-five feet," thus showing if the engine had been supplied with brakes when the horse was first seen, that they could have stopped the engine before the collision and prevented the injury. Farrell, a witness for the plaintiff, says: "With the engine and tank properly equipped with brakes and running at the rate of seven or eight miles an hour

it could be stopped in from sixty to seventy-five feet" (R., pp. 53-81). Roberts, a witness for the defendant, says it ought to have been stopped within thirty-five to forty feet. It could be stopped some quicker if it had brakes on the engine (R., pp. 66, 67). Welch, a witness for the plaintiff, says: "With a good tender brake it ought to have been stopped within forty-five to fifty feet" (R., pp. 70, 71). The proof shows that the horse was discovered on the track from sixty to seventy feet before it was struck by the engine. Now, what is the inference to be drawn from this testimony and the only inference? It is shown from the testimony that the engine without brakes would run from thirty to forty feet further after an effort is made to stop it than it would have gone if it had been supplied with brakes. In this connection the court charges the jury as follows, to-wit:

"Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff suffered his alleged injuries was caused by reason of want of brakes on the engine. For if the accident could not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this action, and your verdict should be for the defendant. On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff, and Davis, the engineer" (R., p. 18).

In this the jury were called upon to say by their verdict whether if the engine had been supplied with brakes the injury would have occurred. If so, they should find for the defendant. The real issue was accurately and concisely put to the jury and they found by their verdict that the injury was caused by reason of the absence of the brakes. Then why all this argument as to whether operating an engine without brakes is negligence *per se*? The jury has found that if the engine had been properly equipped with brakes the injury would not have occurred. Therefore, if by reason of the absence of the brakes the injury did occur, the defendant is responsible. The proof shows that it was negligent, and that such negligence was the sole cause of the injury. The charge of the court in this case was exceedingly fair to the defendant and the real issues were fairly submitted to the jury.

Counsel contend that other issues of fact should have been submitted upon proper instructions. There is nothing in the record to show that other issues should have been submitted; but if it did, why did not counsel for defendant prepare instructions or make some suggestions to the court, calling its attention to the facts proved and asking instructions covering such facts or assumed state of facts. It is too late after reaching this court for the first time to say that the court overlooked important facts and should have instructed the jury upon the same. If learned counsel had made any suggestions to the court as to instructions not given, it must be presumed that the court would have given them if they were proper.

Learned counsel admits that he has gone outside the record in his argument, but attempts to justify himself, because he says the circuit court of appeals went outside of the record. Even if that were true, we hardly think that would justify counsel in inflicting punishment upon this court by discussing matters not of record and which in the nature of things cannot be considered here. We think, however, that we have shown by quotations from the evidence and pleadings that every fact mentioned by the circuit court of appeals in the record in its opinion may be found in the record. Hence, we shall not follow learned counsel by going outside the record.

VIII.

Counsel mentions quite a number of other assignments of error, but they have already been discussed as far as we care to discuss them. He complains, among other things, of the court's charge as to the measure of damages. Upon this question, we call the attention of the court to the evidence of Dr. Sharp (R., pp, 22, 23), and the testimony of the plaintiff (R., pp. 30, 31). From this testimony it is perfectly obvious that the court's charge was correct, and that the damages were absolutely inadequate for the injury received. And, besides, if counsel had wanted any specific charge upon this question, it was his duty to offer such instructions or modifications, and, as they did not, their objections are general and cannot be considered here.

Bussey vs. Ry., 11 Am. & Eng. Cas. (N. S.), 482.

Ry. vs. Soper, 59 F. R., 879.

T. & P. Ry. vs. Cody, 166 U. S., 606.

T. & P. Ry. vs. Volk, 151 U. S., 73.

Goldsby vs. U. S., 160 U. S., 77.

IX.

While we concede the fact that every person has the right to an appeal when he deems that he has been injured by the action of the lower court, whether in its instructions or its rulings as to the admissibility of the testimony; but we submit that in this case no such question of law is involved, that every question has been so often decided by the courts of the country that they have become elementary. We therefore submit that the penalty of 10 per cent should be taxed against the defendant in error, as provided in Section 1062, Sandels & Hill's Digest, which has been approved and enforced by the Circuit Court of Appeals for the Eighth Circuit.

Ry. vs. Elliott, 102 F. R., 96.

The opinion of the circuit court of appeals in this case (114 F. R., 458), is so full and complete that we do not deem it necessary to argue the case further.

Respectfully submitted,

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